

4 EMPLOYER TAKEAWAYS – AND PREDICTIONS – FROM BIDEN’S STATE OF THE UNION ADDRESS

Insights
Mar 2, 2022

During the first State of the Union address with both houses of Congress present since the pandemic began, President Biden made brief references to his ambitious workplace law agenda, touching on several labor and employment topics that he has prioritized over the past year. But given the Democrat’s razor-thin Senate majority, the chilling effect of several moderate Democratic senators who have blunted several of his grander plans, and the possible evaporation of congressional control with the upcoming midterm elections – not to mention the crises at home and abroad that will occupy his attention – how realistic are these proposals? This Insight will review the four most significant labor and employment initiatives raised by the president during the State of the Union (SOTU) address, along with our predictions assessing the likelihood of their coming to fruition.

1. Pay Equity and “Paycheck Fairness”

The president called on Congress to pass the Paycheck Fairness Act, which would require the EEOC to draft regulations that would require employers to produce compensation data to the government. Presumably this would lead to a scenario similar to the infamous “[EEO-1 Component 2 reports](#)” we saw several years ago before they were axed by the Trump administration. Further, the Act would amend federal wage and hour law to (1) restrict the use of the “factor other than sex” defense to wage discrimination claims to “bona fide, job-related factors,” (2) enhance non-retaliation prohibitions, (3) make it

Related People



Cheryl L. Behymer

Senior Counsel

803.255.0000



Steven M. Bernstein

Regional Managing Partner
and Labor Relations Group
Co-Chair

unlawful to require an employee to sign a contract or waiver prohibiting the employee from disclosing information about the employee's wages, and (4) increase civil penalties for violations of equal pay provisions.

Prediction: The bill was narrowly passed by the House in April 2021 and reintroduced in the Senate this past summer – co-sponsored by all 50 Democratic senators – but it was blocked by a group of 49 Republicans in June 2021. It still will not be able to overcome Republican opposition in the Senate and garner the 60 votes needed to overcome their filibuster in 2022. We'll continue to see more activity at the state and local level, but there is not sufficient appetite among Republicans in D.C. to pass sweeping pay equity legislation.

2. Labor Relations and the PRO Act

Yet again, the president is attempting to fulfill his promise of being the most union-friendly president in generations by calling on Congress to pass the Protecting the Right to Organize (PRO) Act. We've written about this bill before – [it reads like a "wish list" for big labor](#) – and if signed into law would potentially bring about the greatest shift of balance on the labor relations front since the Taft-Hartley Act of 1947. Among its many components are provisions that would institute costly financial (and even criminal) penalties for labor law violations, replace secret ballot representation elections with the concept of "card check," and impose collective bargaining agreements on employers in the absence of mutual agreement.

Prediction: This bill is also dead on arrival in the Senate. It has been collecting dust since passing the House in March 2021 with little hope of advancing to a full floor vote. Even if Biden somehow gathers the support of all 50 Democratic senators, there is no chance he can garner the 10 Republican votes it would need to overcome a filibuster. It's possible that enhanced penalties and related PRO Act elements could conceivably become law should the Build American Better budget reconciliation bill make it through the Senate intact, but the open opposition of Senators Manchin (D-WV) and Sinema (D-AZ) suggest that those prospects are unlikely as well in the short term. Instead, the White House will push the NLRB to take up the administration's efforts at the regulatory level. Expect to see expanded remedies for labor law violations, a more

813.769.7513



Kathleen McLeod Caminiti

Partner and Co-Chair, Wage and Hour Practice Group

908.516.1062



Cheryl Pinarchick

Senior Counsel

617.532.8215



Megan C. Winter

Regional Managing Partner

858.597.9622

robust use of injunctions, and a greater level of scrutiny of workplace policies.

3. Federal Paid Family and Medical Leave

Biden briefly mentioned that he wanted Congress to pass paid leave during his SOTU address. He has previously called on Congress to pass comprehensive paid family and medical leave legislation, stressing that nearly four of five private sector workers – and 90% of the lowest-wage workers – have no access to such benefits. [The House recently passed a slimmed-down version of paid leave legislation you can read about here](#), which would offer many workers across the country four weeks of paid leave in a variety of circumstances, including time to bond with a new child, care for a seriously ill family member, or deal with their own serious illness.

Prediction: If this is starting to sound familiar, you're catching on. The proposal as currently outlined and passed by the House stands little to no chance of passing the Senate. While some Republican lawmakers have expressed support for some version of a paid leave program, these proposals have been much more limited in scope – and in some instances called for the payments to be funded by a worker's own social security savings. While this bill stands better odds of passing than the PRO Act or the Paycheck Fairness Act, it would be a long shot.

4. Fight for \$15

While recognizing inflationary pressures, Biden challenged employers to “lower your costs, not your wages.” And if the president has anything to do with it, many employers would be required to hike their wages. Biden has already issued executive actions to ensure 370,000 federal employees and [employees of some federal contractors are paid a minimum of \\$15 per hour](#) – and last night he once again called on Congress to raise the minimum wage for all workers to \$15 per hour. While he didn't name the statute by name, he has been a proponent of the [Raise the Wage Act](#). This bill would boost the federal minimum wage from \$7.25 to \$15 per hour in the next several years and gradually eliminate the tip credit over a similar time frame, both of which already are covered by the EO's impacting federal contractors.

Service Focus

Employee Leaves and Accommodations

Government Contracting, Compliance, and Reporting

Labor Relations

Pay Equity and Transparency

Wage and Hour

Prediction: “So you’re saying there’s a chance....” The House passed a version of this bill in 2019 but it never even saw a vote in the GOP-controlled Senate. As with the other measures noted above, it seems doubtful that 10 Republican senators would support it to overcome the legislative filibuster. However, we could see supporters attempt to frame this proposal through the budget reconciliation legislative process which would require a bare-minimum 50-vote majority (plus a VP Harris tie-breaking vote) for passage. Ironically, the rising cost of fuel and other goods may provide ample justification to hike the minimum wage. While still a bit of a longshot, of all the workplace law proposals mentioned by the president during last night’s SOTU, this one could actually become law one day soon.

Conclusion

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips’ Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [Pay Equity Practice Group](#), our [Labor Relations Practice Group](#), our [Employee Leaves and Accommodations Practice Group](#), or our [Wage and Hour Practice Group](#).